SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1154

JULIAN MESSNER, INC., and MILTON J. SHAPIRO,
Appellants,

v.

WARREN E. SPAHN,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPELLANTS' BRIEF IN RESPONSE TO MOTION TO DISMISS

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against

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Appellee's motion to dismiss would deny the substantiality of the federal question presented by, first, incorrectly restating the question actually submitted as set forth in Appellants' Jurisdictional Statement, and, second, arguing that the record below establishes "knowing and reckless falsity", supporting that argument with arithmetic which does not withstand quantitative or qualitative scrutiny.

1. Appellee's brief (pp. 6, 9) misstates the question raised by Appellants in this appeal. In their Jurisdictional Statement, Appellants have not asserted that the New York statute is unconstitutional on its face. Such contention having been rejected in *Time, Inc.* v. *Hill,* Appellants argue, rather, the question of whether the court below applied the statute unconstitutionally in neither requiring proof nor making a finding of intentional or reckless falsification. This

question was not answered by *Time, Inc.* v. *Hill.* (See note 10 to Mr. Justice Brennan's opinion, 385 U. S. 374, 387, 17 L. Ed. 2d 456, 467).

2. In its decision below, the New York Court of Appeals expressly rejected the application to this case of the standard set forth in *New York Times Company* v. *Sullivan,* 376 U. S. 254, 11 L. Ed. 2d 686, holding, in effect, that proof of knowledge of falsity or of reckless disregard of the truth is not required except in the case of "a libel action brought by a *public official* against critics of his *official conduct*" (italics by the New York Court of Appeals). It is therefore evident that in reaching the decision here on appeal, the court below did not find the required proof of intentional or reckless falsification.

Fundamentally, Appellee's adding machine approach is irrelevant to the constitutional standard enunciated by this Court in *Hill.* By focusing on the biography's alleged "non-factual" elements and failing to distinguish inadvertent from malicious errors, Appellee pays mere lip service to *Hill's* limitation on the constitutional application of the statute.

Nonetheless our own attempt to calculate the number of sentences which Appellee *claims* to be untrue yields no figure even remotely approximating the percentage mentioned at page 8 of Appellee's brief. Using Appellee's computation of 2909 sentences, we find 1348 sentences unchallenged by Appellee, and more than half of the balance challenged because of their presentation in the form of dialogue which had "never existed or taken place" (Appellee's Supplemental Trial Bill of Particulars, p. 2), although at trial both sides stipulated that the dialogue was written to interpret what the author thought the facts were, "not to alter the essential situation", and that much of it was based on secondary sources (R. 75-76).

Our addition of the *claims* of "untruth" shows that in his Bill of Particulars and Supplemental Trial Bill of Particulars (constituting merely a detailed statement of Appellee's *claims,* New York Civil Practice Law and Rules,

Sec. 3041), approximately 26% of the total number of sentences were claimed by Appellee to be "untrue", Appellee's counsel having stated that he had labelled as "untrue" any sentence of which any part, however minor, was in his opinion untrue (R. 256).

But even more important than the quantity of claimed "untruths", is an examination of the quality and substantiality of the "untruths". The "untruthful" sentences in the book concerning which Appellee testified at the trial are listed in Appendix F to our Jurisdictional Statement. The Court will observe that Appellee labels as "untrue" a sentence which says a catcher "lumbered"; the truth, Appellee contended, was that the catcher "waddled" (Item 33, Appendix F). Labelled untrue is the statement in the book that crowds were "meager, apathetic", whereas Appellee testified that the crowds were "small", and were not apathetic (Item 46, Appendix F). Labelled untrue is the sentence stating that Appellee set to work with renewed determination; Appellee testified that he was determined to win from the beginning (Item 37, Appendix F). Labelled untrue is a statement that Spahn's pitching was wild, but that he gradually narrowed his "buckshot" pitches to the approximate limits of the strike zone; the truth, testified Appellee, was that he could pitch at least around the strike zone (Item 20, Appendix F). Qualitatively, we submit, the "untruths" are almost entirely if not all, insubstantial, trivial, inconsequential. It is significant that although Appellee's brief indulges in the unsubstantiated arithmetic, it does not contest at all the insubstantiality of the "untruths" as reflected in Appendix F to the Jurisdictional Statement.

Appellee, without any supporting citation to the record (for none exists), states (at page 10 of his brief) that "Undoubtedly the publisher shared with its author" what he calls the latter's "knowing and reckless falsity". His only support for claiming "knowing and reckless falsity" on the part of the publisher are (1) a comment by the trial judge that the fact that the author followed the customary

practice in creating dialogue based on secondary sources was not a good defense (a factual finding which, we think refutes the claim of wilful or reckless conduct); (2) the trial judge's statement that Appellants' book indicates a "careless disregard for the responsibility of the press" (an impermissible equating of "careless" with "reckless", *Time, Inc.* v. *Hill*, 385 U. S. at 389, 17 L. Ed. 2d at 467, *Garrison* v. *Louisiana*, 379 U. S. 64, 78, 13 L. Ed. 2d 125, 135); and (3) the reprinting of the book by the publisher after Appellee had commenced his law suit (but before the case came to trial). We respectfully submit that the mere commencement of the action was not equivalent to establishment of the validity of Appellee's claims, and did not require the publisher to cease publication of a work which it believed to be constitutionally privileged. Finally, it is impossible to ignore, as Appellee's brief does, the fact that the trial court refused on two occasions to award him exemplary damages and that the Appellate Division affirmed this refusal.

CONCLUSION

We respectfully submit that this appeal presents a substantial federal question and that the Motion to Dismiss should therefore be denied.

Respectfully submitted,

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APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1154. Decided May 22, 1967.

PER CURIAM.

The motion of the Authors League of America, Inc., for leave to file a brief, as *amicus curiae*, is granted.

The judgment is vacated and the case is remanded to the Court of Appeals of New York for further consideration in light of *Time, Inc.* v. *Hill*, 385 U. S. 374.

THE CHIEF JUSTICE and MR. JUSTICE FORTAS would dismiss the appeal for want of a substantial federal question.